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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DIX CHESLEY HERBERT, JR.,

Defendant and Appellant.

F077607

(Super. Ct. No. 18CR00977)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge. (Retired judge of the Merced County Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Peña, Acting P.J., Smith, J. and Meehan, J.

Appellant, Dix Chesley Herbert, Jr., pled no contest to assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).¹ On appeal, Herbert contends the court abused its discretion when it found he violated his *Cruz*² waiver. We affirm.

FACTS

On March 9, 2018, at around 2:00 p.m., during an argument over a marijuana pipe, Herbert struck Vickie Carver on her face three times with a small propane tank and several times with his hands, which caused her to bleed from her right eye and the right side of her face.

On March 28, 2018, a complaint filed by the Merced County District Attorney was deemed an information. The complaint charged Herbert with assault with a deadly weapon and a prior prison term enhancement (§ 667.5, subd. (b)).

On April 13, 2018, Herbert pled no contest to the assault charge in exchange for the dismissal of the enhancement and some unrelated misdemeanor charges, a suspended four-year prison term, and a grant of probation conditioned on Herbert serving 10 months local time and registering for the dependency court drug treatment program. The agreement also provided that Herbert would be released on a *Cruz* waiver at 8:00 a.m. on Sunday, April 15, 2018, and had to report back to court on Thursday, April 19, 2018, at 8:30 a.m. to begin serving the remainder of his 10-month local term. In explaining to Herbert that if he failed to appear he would be sentenced to the suspended four-year prison term, the court stated, “there will be no excuses” and that it would be a “bright-line test.”

On April 19, 2018, Herbert failed to turn himself in.

On June 5, 2018, Herbert appeared in court with his appointed counsel. During a hearing on Herbert’s failure to turn himself in, defense counsel and Herbert advised the

¹ All statutory references are to the Penal Code.

² *People v. Cruz* (1988) 44 Cal.3d 1247 (*Cruz*).

court that the words, “time served” were written on the paperwork Herbert received when he was released. Counsel also argued that Herbert believed he had received credit for time served and asked the court to consider sentencing him to a year in local custody and keeping the remainder of the time suspended. Herbert then apologized to the court and stated that he believed he had already served his time when he was released because that was what the paperwork said.

The court then stated:

“[I] was pretty clear at the sentencing hearing in this matter when I granted you the *Cruz* waiver to try to take care of your property. But you were ordered to report back to the court ... on April 19th. [¶] I’ve reviewed the transcript. It is abundantly clear that that was the order of this Court and that there weren’t going to be any excuses if you failed to appear. I wasn’t going to entertain the type of scenario that is now before me. The court was going to impose the upper term of four years. [¶] The court[] [is] going to keep ... that promise.”

After further discussion, the court imposed the four-year prison term.

DISCUSSION

Herbert contends that in evaluating his *Cruz* waiver violation the trial court used a “bright line” standard rather than the “willfulness” standard it was required to use. He further contends the court did not find that his violation was willful, nor does the record support a finding of willfulness. Thus, according to Herbert, the court’s error requires remand for a hearing on his *Cruz* waiver so the court can apply the correct standard. Respondent contends Herbert’s claims are not cognizable on appeal because he did not obtain a certificate of probable cause and he failed to object. Alternatively, respondent contends Herbert has not met his burden of showing the court used an improper standard in determining that he violated his *Cruz* waiver. We agree with respondent that Herbert’s claims are not cognizable on appeal because he did not obtain a certificate of probable cause.

A defendant who pleads guilty or no contest pursuant to a plea agreement (§ 1192.5) may waive the right to be sentenced pursuant to his plea agreement by a so-called *Cruz* waiver (*Cruz, supra*, 44 Cal.3d at p. 1254, fn. 5; *People v. Maloski* (2001) 25 Cal.4th 1212, 1219–1224.). The defendant may expressly waive his rights under section 1192.5, if he has been fully advised of those rights, the waiver is knowing and intelligent, and it is obtained at the time of the trial court’s initial acceptance of the plea. (*Cruz, supra*, 44 Cal.3d at p. 1254, fn. 5.) Thus, the defendant can expressly agree to a greater sentence as a sanction for engaging in certain behavior as long as his waiver is part of the plea bargain itself. (*People v. Maloski, supra*, 25 Cal.4th at pp. 1221–1222.) If he willfully engages in that behavior, he violates the *Cruz* waiver. (*Cruz, supra*, 44 Cal.3d at p. 1254, fn. 5.) “Willfully” means he knows what he is doing and intends to do it. (§ 7, subd. 1; *People v. Atkins* (2001) 25 Cal.4th 76, 85–86.)

“ ‘A defendant who has pleaded guilty or nolo contendere to a charge in the superior court, and who seeks to take an appeal from a judgment of conviction entered thereon’ must fully comply with section 1237.5 and rule 8.304(b) of the California Rules of Court, which require that the defendant secure a certificate of probable cause in order to challenge the validity of the plea. [Citation.] In the absence of full compliance and a certificate of probable cause, the reviewing court may not reach the merits of any issue challenging the validity of the plea, but must order dismissal of the appeal. [Citation.] Our Supreme Court has expressly disapproved the practice of applying the rule loosely in order to reach issues that would otherwise be precluded.” (*People v. Puente* (2008) 165 Cal.App.4th 1143, 1149.) A “[d]efendant’s challenge to the process by which the court found him in violation of the terms of his *Cruz* waiver is a direct challenge to the validity of his waiver of his rights to be properly charged and convicted.” (*Id.* at p. 1150.)

Herbert’s claim that the court used the wrong standard in finding that he violated his *Cruz* waiver is a challenge to the validity of his plea because it challenges the process

by which the court found him in violation of his *Cruz* waiver. Thus, he forfeited this issue by his failure to obtain a certificate of probable cause from the trial court.

Herbert misplaces his reliance on *People v. Ward* (1967) 66 Cal.2d 571 to contend he did not forfeit this issue. In *Ward* the defendant pled guilty to murder, but his plea did not specify the degree or the penalty. (*Id.* at p. 572.) On appeal, the defendant claimed errors occurred during proceedings held subsequently to determine the degree of his offense. (*Ibid.*) Ultimately, the Supreme Court held that the defendant was not required to obtain a certificate of probable cause to raise claims involving the degree of the offense and the penalty to be imposed. (*Id.* at p. 574.) *Ward* is inapposite because Herbert is not challenging the degree of his offense or the sentence. Thus, we conclude that Herbert's challenge to the court's finding that he violated his *Cruz* waiver is not cognizable and we will dismiss his appeal.

DISPOSITION

The appeal is dismissed.